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Supreme Court of the United States

OCTOBER TERM, 1985

MITCHELL BLOCK, As President Of Direct Cinema Limited, Inc., THE ENVIRONMENTAL DEFENSE FUND, INC., THE STATE OF NEW YORK, THE BIOGRAPH THEATER CORPORATION, THE NEW YORK LIBRARY ASSOCIATION, AND THE ENVIRONMENTAL TASK FORCE, INC.,

Petitioners,

—v.—

EDWIN MEESE III, Attorney General of the United States, and JOSEPH E. CLARKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Petitioners seek a writ of certiorari before judgement and argument in tandem with Meese v. Keene, No. 85-1180, prob. juris. noted April 21, 1986, to decide the following questions:

1. Did the Justice Department exceed statutory authority in designating as foreign "political propaganda" three Canadian documentaries which were distributed in the United States in the commercial, artistic, and aesthetic -- but not political -- interests of the National Film Board of Canada, and which do not reflect systematic manipulation, hidden motives, distortion, or deceit?

2. Did the pejorative public designation of the films as foreign political propaganda violate the First Amendment rights of distributors or exhibitor-sponsors of the films where such designation caused them economic injury and the loss of audience, and where the government advances no governmental interest whatsoever in pejorative designation?

3. Did the Justice Department violate petitioners' First Amendment rights by requiring that their names be reported as exhibitors of foreign political propaganda and placed on file for public examination?

4. Did the designation of the films as foreign political propaganda on the basis of a vague statute and in the absence of any procedural protections violate the First and Fifth Amendments?

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

OPINION BELOW.....1

JURISDICTION.....1

STATUTORY AND REGULATORY PROVISIONS INVOLVED.....1

PRELIMINARY STATEMENT.....5

STATEMENT.....6

REASONS FOR GRANTING THE WRIT.....17

CONCLUSION.....34

APPENDIX A.....1a

APPENDIX B.....39a

APPENDIX C.....45a

TABLE OF AUTHORITIES

CASES **PAGE**

Bantam Books v. Sullivan,
372 U.S. 58 (1963).....17

Block v. Smith,
583 F.Supp. 1288 (D.D.C. 1984),
appeal argued,
No. 84-5318 (D.C. Cir. 1985).....passim

Bolling v. Sharpe,
344 U.S. 873 (1952).....3

Brown v. Board of Education,
344 U.S. 1 (1952).....3

Fixa v. Heilberg,
379 U.S. 997 (1965).....3

Graham & Foster v. Goodcell,
282 U.S. 409 (1931).....3

Greene v. McElroy,
360 U.S. 474 (1959).....3

Hannah v. Larche,
363 U.S. 420 (1960).....3

Johnson v. United States
Shipping Board,
280 U.S. 320 (1930).....3

Kent v. Dulles,
357 U.S. 116 (1958).....14

Lamont v. Postmaster General,
381 U.S. 301 (1965).....3,15,18

CASES (Cont'd) **PAGE**

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).....3,4

McElroy v. Guagliardo, 361 U.S. 281 (1960).....3

Meese v. Keene, 619 F.Supp. 1111 (E.D. Cal. 1985), prob. juris. noted, No. 85-1180.....passim

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).....14

New Haven Inclusion Cases, 399 U.S. 392 (1970).....3

Porter v. Dicken, 328 U.S. 252 (1946).....3

Porter v. Lee, 328 U.S. 246 (1946).....3

Reid v. Covert, 354 U.S. 1 (1957).....3

Rescue Army v. Municipal Court, 331 U.S. 549 (1947).....16

Talley v. California, 362 U.S. 60 (1960).....15

Taylor v. McElroy, 360 U.S. 709 (1959).....3

United States v. Grace, 461 U.S. 171 (1983).....14

CASES (Cont'd) **PAGE**

Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982).....7

White v. Mechanics Securities Corp., 269 U.S. 283 (1925).....3

STATUTES AND REGULATIONS

22 U.S.C. §611 (j).....10,12

22 U.S.C. §614.....10,12,14

28 U.S.C. §1254(1).....1

28 U.S.C. §2101(e).....1

28 C.F.R. §5.401(b).....14

OTHER

Canadian Films and the Foreign Agents Registration Act: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong., 1st Sess. (1983).....10,15

New York Times, June 19, 1984.....10

Wall Street Journal, March 5, 1986.....10

Stern, Gressman, & Shapiro, Supreme Court Practice (6th ed.).....3

OPINION BELOW

The opinion of the district court (App. A, infra, 1a-38a) is reported at 583 F.Supp. 1288 (D.D.C. 1984). The Court of Appeals heard argument on Feb. 12, 1985, No. 84-5318, but has not yet issued a decision.

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari of a "cas[e] in" a court of appeals "before ... rendition of judgment or decree." Under 28 U.S.C. § 2101(e), a petition for certiorari before judgment has been rendered is timely "at any time before judgment."

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Agents Registration Act (FARA), 22 U.S.C. § 611 et seq., and accompanying regulations

are set forth at App. B, infra, 39a-44a

PRELIMINARY STATEMENT

Petitioners previously filed a brief amici curiae concerning the jurisdictional statement in Meese v. Keene, No. 85-1180, prob. juris. noted April 21, 1986, urging this Court to defer resolution of that jurisdictional statement pending the Court of Appeals' resolution of Block v. Smith. Now that the Court has noted probable jurisdiction and agreed to review Keene on its merits, petitioners seek a writ of certiorari before judgment to bring Block before the Court for resolution jointly with Keene.

This case involves precisely the same events which spawned Meese v. Keene, and some identical questions of law. This Court has frequently granted a writ before judgment in

such circumstances in the past.[1] Review of this case together with Meese v. Keene would enable the Court to avoid constitutional adjudication by relying on statutory grounds

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[1] New Haven Inclusion Cases, 399 U.S. 392, 418 (1970); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 12 (1963); Hannah v. Larche, 363 U.S. 420, 422 n.3 (1960); United States v. Thomas, 361 U.S. 950 (1960); McElroy v. Guagliardo, 361 U.S. 281, 283 (1960); Reid v. Covert, 354 U.S. 1, 5 (1957); Graham & Foster v. Goodcell, 282 U.S. 409, 411-12, 415 n.2 (1931); Johnson v. United States Shipping Board, 280 U.S. 320, 25 (1930); White v. Mechanics Securities Corp., 269 U.S. 283, 299 (1925). See also Taylor v. McElroy, 360 U.S. 709, 710 (1959) (certiorari granted before judgment "because of the pendency here of Greene v. McElroy", 360 U.S. 474 (1959), which involved essentially the same important constitutional issues); Brown v. Board of Education, 344 U.S. 1,3 (1952) (taking judicial notice of Bolling v. Sharpe, then pending in the Court of Appeals for the District of Columbia, and inviting the filing of a petition for certiorari before judgment in order to consider constitutional issues similar to those pending in other cases before the Court, which was subsequently granted, 344 U.S. 873 (1952)); Porter v. Dicken, 328 U.S. 252, 254 (1946) (certiorari granted before judgment "by reason of the close relationship of the important question raised to the question presented in Porter v. Lee," 328 U.S. 246 (1946)). Cf. Fixa v. Heilberg, 379 U.S. 997 (1965) (noting probable jurisdiction over case raising same issues as Lamont v. Postmaster General, 379 U.S. 926 (1965)). See generally Stern, Gressman & Shapiro, Supreme Court Practice (6th Ed.) §§ 2.3, 4.20.

for decision urged in Block but not in Keene; would bring before the Court an important issue concerning the public reporting of the names of film exhibitors and sponsors presented by the Canadian films controversy but not raised in Keene; and would afford the Court a more detailed record on critical factual issues, important both on the merits and to enable the Court to obviate passing on the standing of Senator Keene, since Block himself plainly presents classic economic standing necessitating resolution of the merits. See McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16 (1963) (certiorari granted to review one case before judgment which presented common issues of law and related issues of fact as two others granted review; Court resolved case which "presents the question in better perspective, and ... obviates our passing on the jurisdictional question raised in Nos. 91

and 93, since the disposition of these cases is controlled by our decision in No. 107.")

STATEMENT

Peitioners Mitchell Block, President of Direct Cinema Limited, Inc., the State of New York, the Environmental Defense Fund, Inc. the Environmental Task Force, Inc., the New York Library Association, and the Biograph Theater Corporation are the distributors or exhibitor-sponsors of the three Canadian films at issue here, two of which concern acid rain and the third of which concerns the medical effects of nuclear war. In a lawsuit instituted to challenge the government's statutory and constitutional authority to designate the films as political propaganda, they alleged and demonstrated concrete economic injury, First Amendment injury by way of diminished audience and improper official denigration of the information

coveyed by the films, and reputational injury resulting from the stigmatization of those distributing or exhibiting these films as foreign political propagandists. Block v. Smith, 583 F.Supp. 1288 (D.D.C. 1984), appeal argued, No. 84-5318 (D.C. Cir. 1985). The district court dismissed their action for declaratory and injunctive relief for lack of standing, and plaintiffs' appeal was argued in the United States Court of Appeals for the District of Columbia Circuit (Bork, Scalia, and Wright, JJ.) on February 12, 1985.

As in Keene, plaintiffs in Block did not generally challenge the Foreign Agents Registration Act, 22 U.S.C. §611 et seq.("FARA"), or dispute that large portions of it are supported by compelling governmental interests. Their limited attack was to the pejorative and stigmatizing designation of films and books in general, and these films in particular, as foreign

political propaganda, and to the required reporting and public dissemination by the Department of Justice of their names as those who are exhibiting the films. They claimed that the government's actions exceed statutory authority and violate the First and Fifth Amendments. Far from being purely ideological litigants, a status which would have barred standing under Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982), each of the Block plaintiffs either distribute, or have exhibited or seek to exhibit, the particular films the government has denigrated as foreign political propaganda. They alleged, and submitted undisputed evidence to prove, that the government's official pejorative designation of the films and the reporting requirement concretely injured them in three separate ways: by causing them economic harm, First Amendment harm (through, inter

alia, reduced audience or delayed receipt of the intended message), and harm to their reputation. Any one of these harms should be sufficient to permit consideration of the merits.[2]

The record in Block also contained uncontradicted expert testimony (and complaint allegations which should have been taken as true for purposes of the government's motion to dismiss) concerning the damaging effect of designating documentary films as political propaganda on audience size and receptivity to the information conveyed by the films.[3] Indeed,

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[2] For a summary review of the record evidence establishing these harms, see the Brief of Mitchell Block et al, Amici Curiae, Concerning Jurisdictional Statement in Keene, at 9-14, especially nn. 3-5.

[3] See, e.g., Doob Decl. ¶ 3 (Joint Appendix in Block v. Smith, No. 84-5318 ("J.A.") 127) ("political propaganda" designation "is pejorative, denigrating ... and stigmatizing...." It implies that the material "communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods are being employed; ... and that (cont'd next page)

respondents have agreed that, whatever Congress' intention, the effect of the designation of films or other materials as political propaganda is pejorative, not

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some manipulation is involved"); Jones Decl. ¶ 2 (J.A. 142) ("propaganda" implies "systematic manipulation, hidden motives, distortion, or deceit"); Newman Decl. ¶ 3, 4 (J.A. 173-74) ("whatever its origin, propaganda has become a 'dirty word.' The general understanding ... is that when something is labeled propaganda, it should be looked at closely and with suspicion. Indeed, calling something propaganda amounts, for all practical purposes, to saying that it is not worth considering, that it is to be dismissed.... Propaganda ... is not a neutral word. It is taken to mean not simply that a particular point of view is being put forward, but that it is being put forward with ulterior motives and as part of an attempt to mislead those to whom the propaganda is directed.")

A recent Wall Street Journal editorial noted that "agents of the Soviet government...don't share or even recognize the Western press's standards of objectively reported fact. If necessary, they will lie....", and suggested that the network should therefore "superimpose an identification line saying 'propaganda'" on Soviet spokesmen. Wall Street Journal, March 5, 1986, at 32. See, to the same effect, the New York Times, June 19, 1984 at A1 col. 4 (an article headlined "Cuba Move Called Propaganda Ploy", quoting Secretary of State Shultz's description of Cuba's release of prisoners to Reverend Jesse Jackson as a "propaganda victory"). See also Brief of Block et al., Amici Curiae, supra n. 2, at Addendum (statements by President Reagan and other administration officials pejoratively using the term "propaganda"); id. at 27 n. 11 (dictionary definitions).

neutral. Accordingly, the Department of Justice has supported amending FARA's definitional section on "political propaganda", 22 U.S.C. §611(j), and the labelling provision, 22 U.S.C. §614, so that FARA would apply not to "political propaganda" but rather to "political advocacy".[4]

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[4] See Statement of D. Lowell Jensen, Assistant Attorney General, in Canadian Films and the Foreign Agents Registration Act: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 98th Cong. 1st Sess. (1983) (J.A. 217, 219) ("[I]t is fair to say that the original act reflected a perceived close connection between political propaganda and subversion. It is this original focus, I believe, and therefore the perjorative [sic] connotations of the phrases 'foreign agent' and 'political propaganda' which has caused misunderstanding over the years"); Letter of Deputy Attorney General Edward Schmults to Representative Robert Kastenmeier (J.A. 289, 291) ("We would also support the use of a more neutral term [as opposed to political propaganda] like political 'advocacy' or 'information' to denominate information that must be labelled.")

REASONS FOR GRANTING THE WRIT

The noting of probable jurisdiction in Meese v. Keene renders unnecessary any effort to establish the importance of the legal issues raised by the Justice Department's pejorative designation of three Canadian film documentaries as foreign political propaganda. Instead, petitioners simply urge here three reasons why, having decided to review Keene, the Court should review Block as well.

First, Block may preclude the need for constitutional adjudication altogether. The Block plaintiffs (but not Senator Keene) claimed that the application of FARA to the three films exceeds statutory authority in two respects. As demonstrated to the courts below in detail, Congress did not intend that films such as those involved here, which are not subversive -- i.e., designed to overthrow the United States government illegally or to

damage the nation -- or "propaganda" in the commonly accepted usage of that term -- i.e., put forward with ulterior motives as part of an effort to mislead,[5] -- would fall within 22 U.S.C. §611 (j)'s definition of "political propaganda". The record in Block (unlike that in Keene) includes not only the three films, but also numerous affidavits which bear on this issue concerning the films' production, content, and accuracy, submitted by employees of the National Film Board of Canada, American scientists, and the director and producer of one of the films.

Moreover, even assuming that the films are "propaganda", they are not transmitted to or in the United States "for or in the interests of a foreign principal" within the meaning of §614. This section applies only to political propaganda transmitted in a

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[5] See n. 3 supra.

foreign principal's political interests, and the undisputed record in Block establishes that the foreign agent (the New York office of the National Film Board of Canada) is distributing these films solely for artistic and commercial, not political, purposes (Indeed, this undisputed record shows that the foreign principal, the National Film Board of Canada in Ottawa, like our comparable National Endowments for the Arts and Humanities or the Corporation for Public Broadcasting, has no political views or purposes. See, e.g., Litwack Decl. ¶¶ 6-7 (J.A. 157-58)). Acceptance of either of these arguments would provide an alternative statutory basis for the injunction secured by appellee Keene, and would obviate the need for this Court's resolution of the constitutional question raised by the government, consistent with the duty to avoid unnecessary constitutional adjudication.

United States v. Grace, 461 U.S. 171, 175-76 (1983); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979); Kent v. Dulles, 357 U.S. 116 (1958).

Second, Block poses important questions concerning the dissemination reports that the Justice Department requires be filed for public examination. The Justice Department's regulations go well beyond § 614 of FARA by extending the statutory obligation to report "full information as to the places, times, and extent of such transmittal" to require reporting of the name of any "station, organization, or theater" using films subject to FARA, the dates of the showing, and the estimated attendance.[6] This issue is integrally related to the other First Amendment concerns raised by the government's

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[6] The requirement apears on the dissemination reporting form, incorporated by reference at 28 C.F.R. 5.401, and is reproduced at App. C, infra, 45a.

application of FARA to the films; but it was not raised in Keene and is therefore not subsumed in the questions presented for review in Keene. The Court has already held that the Department's collection and public maintenance of similar information, innocuously defined but labeled as "propaganda", "is almost certain to have a deterrent effect," Lamont v. Postmaster General, 381 U.S. at 387; see also Talley v. California, 362 U.S. 60 (1960). Respondent Clarkson and Deputy Attorney General Edward Schmults have informed Congress that the government has no interest in collecting this information.[7]

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[7] See Canadian Films and Foreign Agents Registration Act: Oversight Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 52-53 (1983) (statement of Joseph Clarkson); J.A. 290 (letter of Deputy Attorney General Edward Schmults to Rep. Robert Kastenmeier, Chairman, Subcommitee on Courts, Civil Liberties and the Administration of Justice) ("The Department would support your proposal to eliminate the specific filing and reporting requirements imposed

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Finally, review of Block in addition to Keene would provide the Court with a better factual basis for analyzing the legal issues already presented in Keene. Cf. Rescue Army v. Municipal Court, 331 U.S. 549 (1947). The record in Block presents a more detailed, various, and extensive showing than does Keene of the economic harm, harm to First Amendment interests (through reduced audience and impaired message), and reputational harm (through stigmatization of distributors and exhibitors in publicly maintained files as disseminators of "foreign political propaganda") which respondents have caused petitioners by derogatorily classifying the films. Both questions which this Court has already agreed to decide -- the substantive First Amendment issue raised by application of FARA to these films and the standing issue -- depend on the degree of harm and

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by § 4(a) of the Act.")

impairment to First Amendment interests which defendants have caused.

Thus, whereas Senator Keene's principal basis for standing is his assertion that he would not have shown the films in the absence of an order invalidating defendants' actions in light of the expected audience reaction, and his principal proof of harm is the demonstration of that reaction by way of a public opinion survey, Mitchell Block and his company have incurred lost and deferred sales and rentals, resulting directly in some people not seeing the films who would have done so, but for respondents' actions. Block has therefore established not only classic economic injury in fact, but precisely the kind of injury (government action impairing the communication of messages from willing speakers to otherwise willing listeners) which the First Amendment was adopted to preclude. See, e.g., Bantam Books v.

Sullivan, 372 U.S. 58 (1963); Lamont v. Postmaster General, supra. Accordingly, not only is the standing issue in Block more easily resolved than in Keene on the basis of controlling precedent, but the Block provides a fuller record on which to decide the merits once reached. There is no need to rely here on "chilling effect", or to consider how people might respond to a legislator's showing of a film designated as propaganda. Block demonstrates how people did react -- by deferring or cancelling orders or preview requests which would otherwise have been made;[8] by calling the distributor for information on the legal status of showing the films, necessitating the distributor to make substantial expenditures to respond and to ameliorate the negative effect on sales and rentals caused by the respondents'

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[8] See Brief of Block et al., Amici Curiae, supra n. 2, at 9 n. 3; Barkman Decl. ¶¶ 5,11 (J.A. 83-85).

actions;[9] and, in the case of film cooperatives, libraries, and other non-profit organizations, by instituting special, time-consuming and expensive review procedures that such entities typically require only when dealing with controversial works, which these films became only as a consequence of the Department's designation.[10]

The alternative to granting certiorari and setting Block for argument in tandem with Keene -- holding the petition pending disposition of Keene -- is far less satisfactory. If the Court were to find that Keene does not have standing, that decision would almost certainly not control disposition of Block in light of the very different standing allegations and proofs Block presents. The merits of the Justice

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[9] Id.

[10] See, e.g., Lyons Decl. ¶¶ 4-7 (J.A. 161-62); Barkman Decl. ¶¶ 4-11 (J.A. 83-85).

Department's actions concerning the three films would, in all likelihood, still have to be conclusively decided.

On the other hand, standing may not be dispositive in Keene: and it hardly makes jurisprudential sense to address the legality of the Department's application of FARA on the basis of a record which is far less illuminating on the various harms caused by respondents' classification of the films than the Court has available to it.

CONCLUSION

For the foregoing reasons, a writ of certiorari before judgment should issue to review the judgment below, and this case should be scheduled for argument in tandem with Meese v. Keene, No. 85-1180.

Respectfully submitted,

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APPENDICES

APPENDIX A

Mitchell BLOCK, et al., Plaintiffs,

v.

William French SMITH, et al., Defendants.

Civ. A. No. 83-0672.

United States District Court, District of Columbia.

April 2, 1984.

CHARLES R. RICHEY, District Judge.

I. INTRODUCTION

Plaintiffs in this case are distributors and potential exhibitors of three films produced by the National Film Board of Canada (NFBC). They challenge the United States Department of Justice's application of certain provisions of the Foreign Agents Registration Act (FARA), 22 U.S.C. §§611-618 (1983), to these films. To fully understand the nature of this case, it seems necessary to set out the statutory framework of the FARA. A foreign agent who produces or sends

a film or films to this country sends a copy thereof to the Department of Justice. The Department then determines whether each film falls within the definition of the term "political propaganda" as defined in the FARA statute and its regulations. The FARA requires that every person acting as an agent [1] of a foreign

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[1] The term "agent of a foreign principal" is defined in the FARA as:

> (1) any person who acts as an agent, representative, employee, servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person --
>
> (i) engages within the United States in political activities for or in the interests of such foreign principal;
>
> (ii) acts within the United States as a public relations counsel, publicity agent, information-service, employee or political consultant for or in the interests of such foreign principal;
>
> (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

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principal[2] file a registration statement with the United States Attorney General which provides the agent's name, address and information about the relationship to and

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(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

22 U.S.C. § 611(c).

[2] Under 22 U.S.C. § 611(c), the term "foreign principal" includes:

(1) A government of a foreign country and a foreign political party;

(2) a person outside of the United States unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

activities on behalf of the foreign principal. 22 U.S.C. § 612(a). "Political propaganda" is defined in relevant part as:

> ... any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions ...

22 U.S.C. § 611(j)

If it is determined that an agent is transmitting any "political propaganda" "for or in the interests" of the foreign principal, the agent is required under the FARA to file a statement with the Attorney General within 48 hours of the transmittal of the material setting forth full information

as to the places, times and extent of such transmittal. 22 U.S.C. § 614(a). The Act also requires that the agent affix a label to any material that has been deemed "political propaganda." 22 U.S.C. § 614(b). The label is to reveal "that the person transmitting the political propaganda ... or causing it to be transmitted is registered ... as an agent of a foreign principal" among other things. The labelling requirement of the FARA is not at issue in this case since the parties, by agreement, determined that the requirement did not apply to the plaintiffs herein. See Defendants' Memorandum at p.2; Clarkson Declaration at ¶ 4; Plaintiff's Memorandum at p.1. In addition, the statute and the regulations do not require the Department's label of political propaganda to appear on the film at the time of its showing to the public in any theater or other exhibition method where the public might see the film

either publicly or privately. Defendants' Statement of Material Facts at ¶ 9.

By regulation, the Justice Department requires the filing of Form OBD-69 which calls for the agent to disclose "names and addresses of persons or organizations receiving 100 copies or more" of the materials and specifically for films, the names of any "station, organization, or theater" using the film irrespective of the number of copies received. 28 C.F.R. § 5.401 (1983); See Declaration of Charlie Sims at Exhibit A.

This case centers around three films that were produced by the NFBC. The NFBC office in New York City has since 1947 registered with the Attorney General's Office as an agent of the NFBC, which they have conceded is a part of the Canadian government. See Defendants' Reply Memorandum at Exhibit A, ¶¶ 6, 9. Its most recent

supplemental registration statement describes its activities on behalf of the government of Canada as the:

> Promotion and distribution through commercial and non-commercial channels of Canadian Government information, documentary, and cultural films, filmstrips, and other visual aid materials to public film libraries, educational institutions, government agencies, etc. Activities also include dissemination of catalogues, folders and information sheets describing the films distributed; participation at conferences, seminars and other functions pertaining to the use of audiovisual materials

Clarkson Declaration at Exhibit B.

In accordance with the requirements of the FARA, the NFBC periodically submits information to the Justice Department on its activities, including the titles of films it transmits within the United States. See e.g., Clarkson Declaration at Exhibit B. In the fall of 1982, the Department decided to review five films from a list of 62 films and videotapes distributed by the NFBC during January to June of 1982. See Jensen

Statement at p. 6. On January 13, 1983, the Registration Unit of the Justice Department informed the NFBC that three of the five films constituted "political propaganda" within the meaning of 22 U.S.C. § 611(j). Clarkson Declaration at Exhibit A. The three films were entitled If You Love This Planet, a film depicting the perils of nuclear war, and Acid from Heaven and Acid Rain: Requiem or Recovery, two films concerning the alleged deterimental effects of acid rain on the environment.

Because the Department had found the films to fall within the "political propaganda" definition of § 611(j), the NFBC was informed that it would be required to affix a label identifying the foreign source of the films, and in addition be required to file the statement concerning the dissemination of the materials pursuant to § 614 of the FARA. Pursuant to 28 C.F.R.

§ 5.2, the plaintiffs in this case, who are not affiliated with the NFBC, wrote the Department of Justice in an attempt to clarify their obligations under the FARA. When the Department did not respond, this action ensued.[3]

Plaintiffs seek to prohibit the United States Department of Justice from enforcing the provisions of the FARA with respect to the three NFBC films. Specifically, the plaintiffs claim that by labelling the films as "political propaganda", the Department has injured their First Amendment rights. Plaintiffs claim that this action will deter members of their potential audiences from seeing the films and that the action "damages the process of self-government" by

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[3] At this time the Department is "awaiting a court order regarding the application of the term 'political propaganda' to the three films" before requiring the label to be affixed to the films. Additionally, there have been no dissemination reports filed by the NFBC concerning these films. Clarkson Declaration at ¶ 3.

denigrating the films' messages. Plaintiffs' Memorandum at p. 8. Additionally, they claim that the reporting of their names to the Department of Justice as exhibitors of the films will cause injury to their reputation since they will be stigmatized as exhibitors of "un-American" or "unpatriotic" materials. See Plaintiffs' Memorandum at p. 9, n.*. Given these allegations, plaintiffs claim they have or will suffer sufficient injury in fact which enables them to assert the claim that the FARA is unconstitutional on its face or as applied.

The Court has before it cross-motions for summary judgment and defendants Motion to dismiss on the ground that plaintiffs lack standing to maintain this action. Upon consideration of the parties' memoranda and the entire record herein, the Court is compelled under these facts and under the law to conclude that plaintiffs have failed to

allege sufficient facts to meet the requirement of standing and thus grants defendants' Motion to Dismiss.

II. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

"Standing is an absolute condition which the plaintiff must meet in order to maintain an action." Winpisinger v. Watson, 628 F.2d 133, 137 (D.C. Cir. 1980). The doctrine is employed "to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial determination." Id. at 137. Defendants claim that the plaintiffs in this case have failed to allege "any facts" in support of their claim of injury. Defendants' Memorandum at pp. 3, 10. Because the plaintiffs have not alleged "injury in fact" and since such injury, if any, is not fairly traceable to the defendants' conduct,

the court finds that plaintiffs have no standing to maintain this lawsuit.

In order to have standing, the plaintiffs must demonstrate that they have suffered or will suffer some injury-in-fact from the defendants' actions. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). It must be an injury "that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.'" Id. at 100, 99 S.Ct. at 1608, citing Warth v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The injury-in-fact requirement insures that a case or controversy exists under Article III, § 2, cl. 1 of the United States Constitution. Valley Forge College v. Americans United For Separation of Church and State, Inc., 454

U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72, 98 S.Ct. 2620, 2630, 57, L.Ed.2d 595 (1978).

To satisfy the Article III requirements, the plaintiffs must show that they personally have suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendants. Gladstone, 441 U.S. at 99, 99 S.Ct. at 1607; Warth, 422 U.S. at 499, 95 S.Ct. at 2205. Such injury must be "distinct and palpable" as opposed to speculative or attenuated, Warth, 422 U.S. at 501, 95 S.Ct. at 2206, and the "party seeking review must allege facts showing that he is himself adversely affected ...." Seirra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (emphasis added).

At an "irreducible minimum," Article III also requires that the injury can be fairly traced to the challenged actions of the

defendants and that the injury is "likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976); Valley Forge, 454 U.S. at 472, 102 S.Ct. at 758; Common Cause v. Department of Energy, 702 F.2d 245, 250 (D.C. Cir. 1983); Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir. 1980). Even if these criteria are met, a plaintiff may still lack standing "under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated ...." Gladstone, 441 U.S. 99-100, 99 S.Ct. 1607-1608.

Upon close examination of the complaint, affidavits and declarations submitted to the Court by plaintiffs, and after construing these documents in favor of the plaintiffs, as dictated by Warth v. Seldin, 422 U.S. 490,

501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975) the Court concludes that plaintiffs have failed to meet their burden under Article III.

A. Plaintiffs Have Failed To Allege Injury-In-Fact

At the outset, it is important to note two things concerning plaintiffs' allegations of injury in this case. First, plaintiffs have not alleged that their rights to obtain, exhibit or view the three films have been interfered with because of the Department of Justice action. Indeed, it is undisputed that they could not allege such injury because the FARA does not prohibit foreign advocacy or place any limitations on the availablity or showing of any material deemed to be "political propaganda". Cf. Jensen Statement at 7. Additionally, the Court notes that the registration, dissemination, and labelling requirements of the FARA do not

apply to any of the plaintiffs in this case. See Clarkson Declaration at ¶ 4; Stipulation of June 13, 1983 (agreed that plaintiffs in this case are not "agents of a foreign principal" under the FARA). Plaintiffs, therefore, cannot allege that they are injured because of any requirement in the FARA for action on their part. [4]

Plaintiffs do argue that defendants have caused injury by designating the three films as "political propaganda". More specifically, they claim that "defendants have deterred members of each plaintiff's audience for the films who would have viewed them but for the ... classification" and that by officially "denigrating" the films'

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[4] In contrast, in the case of Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965), plaintiffs were denied access to the mails unless they performed the affirmative act of returning a postcard saying that they would accept political propaganda. Such suppression of communication does not exist in this case.

messages, damaged the "processes of self-government by inducing the public to discount both the content of the films and the groups exhibiting them." Plaintiffs Memorandum at p. 8.

The complaint, by itself, does not allege any specific facts tending to show injury to the plaintiffs. For those claims still existing in this case,[5] the complaint notes that the defendants "have caused and are continuing to cause plaintiff irreparable injury by (1) inaccurately stigmatizing him as a disseminator of foreign political propaganda; [and] (2) improperly denigrating the aesthetic, artistic and educational value of the films as political propaganda." See Complaint at ¶¶ 17-21. Since the complaint was filed, plaintiffs have submitted a series

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[5] Some time after the plaintiffs filed the complaint, the parties reached an agreement with respect to several issues initially raised.

of declarations in support of their Motion for Summary Judgment, and in order to more specifically allege their particular injuries. The Court concludes, however, that these additional materials amount to no more than speculative personal opinions on the effect of the Justice Department's classification of the films as "political propaganda" and of the requirement that the NFBC provide a list of those organizations that receive copies of the films. As such, the Court is unable to find allegations of a "distinct and palpable" injury.

1. The Dissemination Report

Under ¶ 4 of the FARA, agents of a foreign principal who transmit materials determined to be "political propaganda" under the Act are required to file a statement with the Attorney General "setting forth full information as to the places, times, and

extent of such transmittal." 22 U.S.C. ¶ 614(a). For films, this includes places of exhibition. 28 C.F.R. § 5.401 (1983).

Although no dissemination reports have been filed yet by the NFBC, plaintiffs claim that the potential injury is concrete enough to justify a finding of standing. The Court disagrees. The vast majority of "factual" allegations on this issue that plaintiffs place before the Court in opposition to Defendants' Motion to Dismiss are statements that plaintiffs "do not wish" or "object" to their names being reported to the Justice Department as exhibitors or distributors of "political propaganda". Cleveland Declaration at (New York Attorney General's office asked the NFBC for an assurance that its name would not be reported); Kulick Declaration at ¶ 8; Sauer Declaration at ¶ 8; Brown Declaration at ¶ 7 ("EDF objects to its name being provided to the Department of

Justice"); Cohen Declaration at ¶ 4 ("ETF does not wish its name ... to be reported to the federal government ..."'; Poryles Declaration at ¶ 2 (Biograph "objects" to revealing its name.); Shields Declaration at ¶ 4 (New York Library Association does not want its name reported to the Department of Justice). Plaintiffs' desires, no matter how genuine, cannot be transmformed into facts showing injury due to the reporting of their names.[6]

In Field v. Brown, 610 F.2d 981, 989-90

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[6] Plainttiff Block, the exclusive distributor of the film If You Love This Planet, points to the fact that "[a]t least a dozen customers have specifically asked us not to reveal their names ...." Block Declaration at ¶ 13. The Court, lacking a more definite statement from Block, assumes that such facts are presented to show that Block is injured by some requirement that he reveal names to the Justice Department. It is undisputed that Plaintiff Block is not an "agent of a foreign principal" under the FARA and is therefore under no federally imposed obligation to do so. Block's obligation stems from a separate contractual agreement he entered into with the NFBC, and not any Justice Department requirements. Block Declaration at ¶¶ 12, 13.

(D.C. Cir. 1979), cert. denied, 446 U.S. 939, 100 S.Ct. 2160, 64 L.Ed.2d 792 (1980), this Circuit noted:

> Plaintiffs are not entitled to invoke the judicial power to determine the constitutionality of a statute unless they can demonstrate that they have sustained, or are in immediate danger of sustaining, a direct injury as the result of enforcement of the statute. See, e.g. Laird v. Tatum, 408 U.S. 1, 13, 92 S.Ct. 2318 [2325], 33 L.Ed.2d 154 (1972), Ex parte Levitt, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937). Stated differently, a plaintiff must present "a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. at 14, 92 S.Ct. at 2326.

The only additional allegations the Court can find in plaintiffs' pleadings are generalized allegations that each plaintiff will somehow be "stigmatized" in a negative fashion as an exhibitor or distributor of "political propaganda." Block Declaration at ¶ 15 ("We are stigmatized as distributors of foreign political propaganda ... a term which has negative connotations to the American public

.... A number of callers have expressed the views ... that we are communists ..."); Shields Declaration at ¶ 4 (New York Library Association); Brown Declaration at ¶ 7 (Environmental Defense fund "will be known as a disseminator of ... political propaganda, ... [a] characterization which undermines our credibility as a scientifically responsible, politically independent organization .... [S]tigmatization is likely to damage EDF's reputation, and impair [its] ability to raise funds."); Cohen Declaration at ¶¶ 6-7 (Environmental Task Force "does not want to be characterized as a disseminator of political propaganda because of the ... adverse impact it would likely have on our role as communicators of credible data .... Such a designation has the connotation to many americans of 'un-American or communist' activity ...."); Poryles Declaration at ¶¶ 4-6 (Biograph Theater is concerned that

disclosure of its name will label it an exhibitor of political propaganda. Such a disclosure denigrates its reputation as a theater showing only films of "aesthetic, artisitic or educational merit".)

These allegations are highly speculative. In order to find allegations of factually specific injury, the Court would be forced to make several assumptions concerning the reaction of the public to the listing of plaintiffs in the dissemination reports. First, the Court would have to assume that the public would react negatively to a film labelled "political propaganda" despite the neutral definition of the term provided in the FARA. See 22 U.S.C. § 611(j). Additionally, the Court would have to assume that this "negative reaction" would cause potential audience members to discount the films' messages or avoid the films completely.[7] Finally, the court would have

to assume that the public will lose respect for the plaintiffs because they chose to show the movies, even though it is clear that the FARA does not, on its face denigrate the "aesthetic, artistic or educational merits" of the films.[8] The Court cannot make such assumptions for the plaintiffs in the absence of any facts tending to show that such fears are concrete or likely to materialize as actual injury. See Winpisinger v. Watson, 628 F.2d 133 (D.C. Cir. 1980). Plaintiffs have failed to allege any facts showing any damage to their respective reputations. Although Plaintiff Block claims that several

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[7] The Court believes that it may be just as likely that the added publicity about the films because of this controversy may attract a larger audience for plaintiffs. The result is simply too speculative to predict.

[8] The Court notes at this point that one of the films at issue here today, If You Love This Planet was awarded an Academy Award by the Academy of Motion Picture Arts and Sciences for Best Short Documentary of 1982.

callers have expressed the view that his company is "communist," nothing the government has said or done can reasonably be interpreted to lead to that conclusion. In addition the Court cannot find any evidence in the record of any potential viewer or customer of the plaintiffs who has refused or will refuse to deal with the plaintiffs because of their acceptance or potential acceptance of the films.

The injury is not only speculative, but in all likelihood, non-existent. This case is unlike the case of Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965) where individuals were required to fill out a card requesting that information determined to be "communist political propaganda" be sent to them. The term "communist" is a word that is commonly deemed to be characteristic of un-American or anti-democratic conduct. "Political

propaganda" is a term that can refer to both American and foreign advocacy of a particular viewpoint. One who exhibits materials that have not been clearly pejoratively labelled is not injured by the compilation of a list of such exibitors by the federal government.[9]

2. The "Political Propaganda" Classification

The Plaintiffs have alleged that the

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[9] The varied definitions of the term "political propaganda" supplied by plaintiffs and defendants in this case are even more evidence of the speculative nature of plaintiffs' injury. Compare Newman Declaration at ¶ 3 and Dobb Declaration at ¶ 3 with American College and Random House Dictionary definitions provided at page 14 of defendants' memorandum. The term clearly means different things to different people, but the FARA does not define the term in any negative fashion. As such, the classification of the films as "political propaganda" under the Act and the NFBC's reporting of exhibitors' names to the Justice Department cannot constitute injury. Furthermore, evenif the plaintiffs could have alleged more particularized injury, above and beyond their predictions of public reactions, such injury would be due to the public's false impression that the government had negatively classified the films rather than due to the government's attaching of a neutrally defined word under the FARA. As such, plaintiffs' injuries would not be fairly traceable to the defendants' conduct in this case.

Department of Justice's classification of the films as "political propaganda" under 22 U.S.C. § 611(j) has deterred members of plaintiffs' audiences from viewing the films and has "denigrated" the film's message thereby restricting the free flow of information protected by the First Amendment. Plaintiffs' Memorandum at p. 8. The term "political propaganda" is defined in the FARA, and it is a fundamental cannon of statutory construction that "unless otherwise defined, word will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). In this case, the term is otherwise defined and the court must therefore defer to the neutral, non-pejorative definition contained in the FARA.

The Court wishes to recognize, however, a point raised by Judge Ramirez in the

Eastern District of California. In Keene v. Smith, 569 F.Supp. 1513 (1983), Judge Ramirez noted that "it may be beyond the power of Congress to determine, for example, that all materials addressing public policy issues and originating from foreign sources shall hereinafter be called 'poison' ..." Id. at p. 1522. Recognizing that such labelling may be inappropriate given the clear negative connotations to the word "poison", and given the Court's obligation to subject statutes implicating First Amendment rights with "exacting scrutiny", Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), the Court will briefly examine the purpose of the FARA in order to determine whether the act was designed to impose negative connotations on the materials so as to deter audience viewing. With such a finding, the allegations of government action in this case

could be enough to find standing.[10]

In Attorney General v. Irish People, Inc., 684 F.2d 928 (D.C. Cir. 1982), the D.C. Circuit extensively reviewed the caselaw and legislative history of the FARA. The Court quoted the Supreme Court decision in Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943):

> As the House and Senate Committees considering the bill said, it "does not in any way impair the right of freedom of speech, or of a free press, or other constitutional rights." Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

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[10] The Court, however, does not agree with Judge Ramirez' findings on the issue of standing. The Congressman in that case, who wished to exhibit the films, alleged similar injuries as the plaintiffs herein. The speculative nature of such injuries should have precluded a finding of standing.

Subsequent to extensive amendments to the Act, one Court still noted that:

> The purpose of the act is to protect the interests of the United States by requiring complete public disclosure by persons acting for or in the interest of foreign principals .... These disclosures offer the Government and our people the opportunity to be informed and therefore enable them to understand the purposes for which they act.

Attorney General v. INAC, 346 F.Supp. 1384, 1390 (S.D.N.Y.), aff'd mem., 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 1080, 93 S.Ct. 679, 34 L.Ed.2d 669 (1972).

The very existence of the label "political propaganda" neither causes injury to plaintiffs nor inhibits the exercise of the public's right to know. It is clear that Congress sought to bring out in the open those activities by a foreign agent "carried on in particularly sensitive areas in which the line between political and non-political action is difficult to define." H.R.Rep. No. 1470, 89th Cong., 2d Sess. 4 (1966),

reprinted in, U.S. Code Cong. & Admin. News 1966, p. 2400. Specifically, Congress sought to inform the public of the nature of foreign materials on "matters which on the domestic level would be called a policy matter ...". Id. at 7, U.S. Code Cong & Admin News 1966, at p. 2403. Acid rain and nuclear war, the issues addressed in the three films in this case are just such issues in which the Government seeks full disclosure of information. The Court notes that the classification of the films as "political propaganda", or a similar classification may be the only way to ensure full disclosure since the labelling requirements of 22 U.S.C. § 614 do not apply to exhibitors once they receive the films from the NFBC. Since the classification by itself does not show injury in fact, the Court now proceeds to examine the additional information and pleadings provided to the Court in Opposition to

Defendants' Motion to Dismiss.

As with the issue of the dissemination reports, the Court finds that plaintiffs have failed to allege specific facts constituting injury that are not speculative in nature. Most of the allegations concerning this issue are speculative opinions as to the effects of the classification.[11] Balantyne Declaration at ¶ 7 ("classification ... will seriously discourage many citizens from attending any viewing"); Kulik Declaration at ¶ 7; Sauer Declaration at ¶ 7; Converse Declaration at ¶ 7; Erlandson Declaration at ¶ 6; Cleveland Declaration at ¶ 9; Shields Declaration at

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[11] In fact, there is some evidence that the injury plaintiffs really claim is the generalized right of the public to be informed and educated about acid rain and nuclear war. Cleveland Declaration at ¶ 10 ("The people of the State of New York are entitled to receive scientific analysis and commentary concerning a problem of immense importance ..."); see also Ballantyne Declaration at ¶¶ 8-9; Kulick Declaration at ¶ 10; Sauer Declaration at ¶ 10. Such a generalized grievance is clearly not enough to confer standing.

¶ 5 (New York Library Association "believes" that classification will prejudice attitudes of potential viewers.); Brown Declaration at ¶ 10 (Environmental Defense fund stated that "classification will adversely affect the perception of viewers as to the objectivity and scientific merit of the information presented in the films."); Cohen Declaration at ¶ 6 (the classification "may" also deter some citizens from viewing the films at all); Poryles Declaration at ¶ 5 (Biograph Theater objects to the classification "so that its audience can freely judge the worth of each film").

The Court can find no allegations of fact that would indicate that audiences have diminshed or that citizens are not seeing the films because of the "political propaganda" classification. In addition, there is no evidence in the record of any citizens who have had their opinion of the movies altered

in any respect because of the classification.[12] On the contrary, there is some evidence to indicate that the movies are not being affected by the classification. Plaintiff Block admits that distribution of the film If You Love This Planet has been profitable and that he plans to continue

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[12] The only specific factual allegations are contained within the Declaration of Mitchell Block, who is the President of an organization with the exclusive rights in the United States to distribute the film If You Love This Planet. Block claims that he and his employees have had to spend numerous hours answering inquiries about the status of the film, and that "sales agents have received numerous calls seeking information about obtaining the film." Block Declaration at ¶ 10. Such facts may just as easily show an increased interest in the film because of its surrounding controversy. Additionally, Block asserts that six potential customers have deferred decisions on whether to use the film until after the controversy surrounding the films has ended and that in his "opinion", other potential customers will never purchase or use the film. Block Declaration at ¶ 11. There is still no evidence of a decrease in sales or of any one customer emphatically refusing to use the film because of classification. Finally, Block presents some opinion evidence that sales are lower than they should be for an Academy Award winning documentary. See Roberts Declaration at ¶ 4. Such an estimate on a matter so intimately related to the quality and subject matter of a film is highly speculative.

distributing the film. Block Declaration at ¶ 9. Additionally, even though Timonthy Lyons, the President of the University Film & Video Association, claims that the classification "threaten[s] the free and open exchange of ideas", in the midst of the controversy, his Association decided to make the film available to participants at a recent film conference. Lyons Declaration at ¶¶ 6-7.

III. CONCLUSION

The pleadings and record herein demonstrate that the statute, the regulations, and the actions of the Department of Justice thereunder, in connection with this case, do not explicitly or implicitly label the exhibitors in question or distributors of the three films in question as disseminating anything other than a "communication 'relative to ... the

political or public interests, policies, or relations of a government of a foreign country ...'". The speculation in the declarations of this record by the plaintiff that the foregoing means that they are on a list of organization disseminating communist propaganda do not come close to a showing of injury-in-fact under the law. The label "political propaganda" does not mean "communist propaganda" or that the individuals or organizations receiving the films are un-American or communists. Anyone in the American public who visits a theater to see the films or advertisements about it will not be subjected to any denigrating label or be restricted in any fashion by the federal government from viewing the films.

The Court concludes that because the plaintiffs in this case have failed to allege any injury beyond that which is abstract and speculative, they do not have standing to

challenge the actions of the Department of Justice under the FARA. As such, plaintiffs' complaint shall be dismissed for failure to state a case or controversy under the United States Constitution. The Court will enter an order in accordance with the foregoing of even date herewith.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MITCHELL BLOCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. 83-0672
	)	
WILLIAM FRENCH SMITH, et. al.,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of Defendant's Motion To Dismiss on the ground that plaintiffs lack standing to maintain this action, the plaintiffs opposition thereto, and the entire record herein, and for the reasons set forth in the accompanying opinion, it is this 2nd day of April, 1984, hereby

ORDERED that defendants' motion be, and the same is hereby, granted. It is further

ORDERED that the above-captioned case be dismissed from the Court's docket.

/S/
UNITED STATES DISTRICT JUDGE

APPENDIX B

STATUTORY PROVISIONS INVOLVED

22 U.S.C. 611 provides in pertinent part:

§ 611. Definitions

As used in and for the purposes of this subchapter—

* * * * *

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means—

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the

order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

* * * * *

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person

(1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails; * * *.

22 U.S.C. 614 provides:

§ 614. Filing and labeling of political propaganda

(a) Copies to Attorney General; statement as to places, times, and extent of transmission

Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmit or causes to be transmitted in the United States mails or by any means or in-

strumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

(b) Identification statement

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda; that the

person transmitting such political propaganda or causing it to be transmitted is registered under this subchapter with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that, as required by this subchapter, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the subchapter does not indicate approval by the United States Government of the contents of their political propaganda. The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate.

(c) Public inspection

The copies of political propaganda required by this subchapter to be filed with the Attorney General shall be available for public inspection under such regulations as he may prescribe.

28 C.F.R. 5.401 provides:

(a) A Dissemination Report shall be filed with the Registration Section for each item of political propaganda that is transmitted, or caused to be transmitted, in the United States mails, or by any means or instrumentality of interstate or foreign commerce, by an agent of a foreign principal for or in the interests of any of his foreign principals.

(b) The Dissmeniation Report shall be filed on Form DJ-310.

(c) Except as provided in paragraph (d) of this rule, a Dissemination Report shall be filed no later than forty-eight hours after the beginning of the transmittal of the political propaganda.

(d) Whenever transmittal of the same political propaganda are made over a period of time, a Dissemination Report may be filed monthly for as long as such transmittals continue.

(e) A Dissemination Report shall be complete in and of itself. Incorporation of information by reference to reports previously filed is not permissible.

APPENDIX C

U.S. Department of Justice
Washington, D.C. 20530

Dissemination Rep

INSTRUCTIONS: Report must be submitted in duplicate to the Registration Unit, Internal Security Section, Criminal Division, Department of Justice, Washington, D.C. 20530. The original must be signed by or on behalf of the registrant. All items in this form must be answered, unless the answer is "none" or "not applicable," in which case such an entry shall be made in the appropriate space. If additional space is needed for any item, attach supplemental sheet identifying each item.

1. Name of registrant	2. Registration No.

3. Nature of material *(A concise account of the nature of the propaganda material filed)*

4. Title of material, if any	5. Name of foreign principal on whose behalf this material was transmitted.

6. Means of transmission	7. Dates of transmission	8. Total copies transmitted

9. List addresses from which this material was transmitted:	10. List states and territories of the United States to which material was transmitted:

11. Types of recipients *(Give number of organizations in each group)*	12. List names and addresses of persons or organizations receiving 100 copies or more:
Libraries _____ Public officials _____ Newspapers _____ Press services of associations _____ Educational institutions _____ Civic groups _____ Other *(specify)* _____	

13. If the material transmitted was a film or radio or television script, furnish the following information:

Name of station, organization, or theater using *(including city and state)*	Date or dates broadcast or shown	Estimated attendance (for film(s))

14. Have two copies of this material been filed with the Department of Justice? Yes ☐ No ☐

15. Has this material been labeled as required by the act? Yes ☐ No ☐

Date of report	Name and title	Signature

Formerly OBD-49

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1837

In the Supreme Court of the United States

OCTOBER TERM, 1985

MITCHELL BLOCK, ETC., ET AL., PETITIONERS

v.

EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, AND JOSEPH E. CLARKSON

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the films in question were properly classified as "political propaganda" within the meaning of the Foreign Agents Registration Act, 22 U.S.C. 611(j).

2. Whether a regulation promulgated by the Department of Justice exceeds its statutory authority under the Foreign Agents Registration Act, 22 U.S.C. 611 *et seq.*

3. Whether the use of the term "political propaganda" in the Foreign Agents Registration Act, which is expressly defined in the Act in a neutral and valid way, violates the First Amendment because in common usage the word "propaganda" might be understood to have a pejorative meaning.

4. Whether petitioners, who are not foreign agents under the Act and are not subject to the requirements or sanctions of the Act, have standing to challenge the constitutionality of the statutory term "political propaganda."

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Califano v. *Yamasaki*, 442 U.S. 682	10
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837	15
Coleman v. *Paccar Inc.*, 424 U.S. 1301	9
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112	10
Greene v. *McElroy*, 360 U.S. 474	18
Hannah v. *Larche*, 363 U.S. 420	18
Johnson v. *Fleet Corp.*, 280 U.S. 320	17-18
Keene v. *Smith*, 569 F. Supp. 1513, subsequent opinion, 619 F. Supp. 1111, prob. juris. noted *sub nom. Meese* v. *Keene*, No. 85-1180 (Apr. 21, 1986)	7, 8, 14
McCulloch v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10	16, 18
Meese v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986)	*passim*
Merck & Co. v. *Staats*, cert. before judgment denied, 449 U.S. 1038	11, 18
New Haven Inclusion Cases, 399 U.S. 392	18
Porter v. *Dicken*, 328 U.S. 252	17
Porter v. *Lee*, 328 U.S. 246	17
SmithKline Corp. v. *Staats*, cert. before judgment denied, 449 U.S. 1038	11, 18
Taylor v. *McElroy*, 360 U.S. 709	18
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56	10

Cases—Continued: Page

United States v. *Albertini*, No. 83-1624 (June 24, 1985) 13
United States v. *Mendoza*, 464 U.S. 154 10
Washington v. *Fishing Vessel Ass'n*, 443 U.S. 658 .. 18

Constitution, statute, regulation and rule:

U.S. Const.:
Art. III 6
Amend. I 5-6
Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.* 2
22 U.S.C. 611(b)(1) 2
22 U.S.C. 611(c) 3
22 U.S.C. 611(j) 3, 13, 14
22 U.S.C. 611 note 2
22 U.S.C. 612 3
22 U.S.C. 614(a) 3, 4, 13, 14, 15
22 U.S.C. 614(b) 3
22 U.S.C. 614(c) 3
22 U.S.C. 616(a) 4
22 U.S.C. 620 14
28 C.F.R. 5.401(b) 4, 14
Sup. Ct. R. 18 9

Miscellaneous:

H.R. Rep. 1470, 89th Cong., 2d Sess. (1966) 8, 9, 14

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-37a) is reported at 583 F. Supp. 1288.

JURISDICTION

The judgment of the district court (Pet. App. 38a) was entered on April 2, 1984. On May 16, 1984, petitioners filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit (No. 84-5318). The court of appeals heard

argument on February 12, 1985, but has not yet rendered a decision. The petition for a writ of certiorari before judgment was filed on May 5, 1986. The jurisdiction of this Court to review the case by the writ of certiorari before final judgment in the court of appeals is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATEMENT

1. This case, like *Meese* v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986), arises under the Foreign Agents Registration Act of 1938 (FARA), 22 U.S.C. 611 *et seq.* As Congress has explained, it is

> the policy and purpose of this Act * * * to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

22 U.S.C. 611 note.

FARA establishes a comprehensive scheme of registration, reporting, and disclosure for "agents" of "foreign principals." The Act defines "foreign principal" to include "a government of a foreign country." 22 U.S.C. 611(b)(1). In addition, it defines "agent of a foreign principal" to mean in relevant part "any person who acts as an agent, representative, employee, or servant * * * of a foreign principal" and "who directly or through any other person

* * * engages within the United States in political activities for or in the interests of such foreign principal." 22 U.S.C. 611(c).

An agent of a foreign principal as defined in the Act is required to file with the Attorney General a registration statement incorporating specified information. 22 U.S.C. 612. In addition such agent is required to submit to the Attorney General a copy of any "political propaganda for or in the interests of such foreign principal" that the agent transmits in the United States mail or by any means of interstate or foreign commerce. 22 U.S.C. 614(a). The Act defines the term "political propaganda" to include any communication that:

> is reasonably adapted to * * * in any * * * way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country * * * or with reference to the foreign policies of the United States.

22 U.S.C. 611(j).

The agent must mark any such materials with an identification statement that sets forth the relation between the agent and the materials, explains that the agent is registered with the Department of Justice under the Act and discloses the name of the agent and the foreign principal, advises that the agent's registration statement and the disseminated materials are available for inspection at the Department of Justice, and contains a disclaimer that registration of the agent does not indicate approval by the United States of the contents of the materials. 22 U.S.C. 614(b); see also 22 U.S.C. 614(c). The standard form of the identification statement for films does not use the statutory term "political propaganda" and reads as follows:

> This material is prepared, edited, issued or circulated by (name and address of registrant) which is registered with the Department of Justice, Washington, D.C. under the Foreign Agents Registration Act as an agent of (name and address of foreign principal). Dissemination reports on this film are filed with the Department of Justice where the required registration statement is available for public inspection. Registration does not indicate approval of the contents of this material by the United States Government.

C.A. App. 257. The labeling requirement is applicable only to agents of foreign principals under the Act and does not apply to subsequent disseminators or recipients of the materials, such as petitioners. In fact, such people are free to remove the identification statement that the foreign agent was required to affix to the materials (Pet. App. 5a-6a, 15a-16a, 31a).

Finally, the Act requires the agent to submit to the Attorney General a report setting forth the places, times, and extent of the agent's dissemination of "political propaganda" for or in the interests of the foreign principal. See 22 U.S.C. 614(a); see also 22 U.S.C. 616(a). A regulation of the Department of Justice provides that the dissemination report shall "[l]ist the names and addresses of persons or organizations receiving 100 copies or more [of the materials]" and, for films, identify the "[n]ame of station, organization, or theater using [the films]," the "[d]ate or dates [the films were] broadcast or shown," and the "[e]stimated attendance." See 28 C.F.R. 5.401(b), incorporating by reference DOJ Form OBD-69 (Pet. App. 44a-45a).

2. The National Film Board of Canada (Ottawa) produces films in Canada. It is an agency of the government of Canada and thus a "foreign principal" under the Act. The National Film Board of Canada (New York office) (NFBC-NY) is the agent of the National Film Board of Canada (Ottawa) in the United States and since 1947 has registered with the Attorney General pursuant to FARA (Pet. App. 6a). In a recent registration statement, the NFBC-NY has described its activities in part as the "[p]romotion and distribution through commercial and non-commercial channels of Canadian Government information" (*id.* at 7a). In complying with the provisions of FARA, the NFBC-NY does not routinely label its materials in the first instance but instead submits films as requested by the Department of Justice for a determination of those that are covered by the Act (*ibid.*).

In 1982, the NFBC-NY submitted to the Department a list of 62 films and videotapes that it had distributed during that year. The Department reviewed five of the films and concluded that three of them included "political propaganda" within the meaning of the Act. Two of the films, *Acid from Heaven* and *Acid Rain: Requiem or Recovery*, address the subject of acid rain; the third film, *If You Love This Planet*, concerns nuclear war. Pet. App. 8a. The same three films are at issue in *Meese* v. *Keene*, *supra*.

3. On March 9, 1983, petitioners commenced the instant action for declaratory and injunctive relief in the United States District Court for the District of Columbia. They argued that the use of the term "political propaganda" in FARA, as applied to the three films in question, violated the First Amend-

ment. In addition, they challenged the Department of Justice's classification of the films as "political propaganda" within the meaning of the statute. Finally, they contested the validity of the Department's regulation prescribing the contents of the required dissemination reports.

Without reaching the merits, the district court dismissed the action for lack of standing (Pet. App. 1a-37a). "Upon close examination of the complaint, affidavits and declarations submitted to the Court by [petitioners], and after construing these documents in favor of [petitioners]" (*id.* at 14a), the court concluded that petitioners "failed to meet their burden" (*id.* at 15a) to establish Article III standing because of the absence of cognizable " 'injury in fact' " and the lack of any alleged injury that is "fairly traceable to [respondents'] conduct" (*id.* at 11a).

The district court first noted that petitioners "have not alleged that their rights to obtain, exhibit or view the three films have been interfered with because of the Department of Justice action" and that "[i]ndeed, it is undisputed that they could not allege such injury because the FARA does not prohibit foreign advocacy or place any limitations on the availability or showing of any material deemed to be 'political propaganda' " (Pet. App. 15a). Likewise, the court noted "that the registration, dissemination, and labelling requirements of the FARA do not apply to any of the [petitioners] in this case" (*id.* at 15a-16a) since they are not foreign agents under the Act.

Although not directly subject to FARA, petitioners alleged three types of harm to themselves from the application of the statute to the Canadian films. First, they contended that the statutory phrase "political propaganda" is a pejorative term that stig-

matizes them as distributors and exhibitors of the films. Second, they asserted economic injury because of the alleged adverse reaction of potential viewers to the fact that the film had been determined to meet the statute's definition of "political propaganda." Third, petitioners argued that the term "political propaganda" disparaged the films and prejudiced viewers against their content, thus chilling petitioners' right to exhibit the films and interfering with their ability to communicate effectively.

All of these alleged injuries rest at bottom on the contention that the term "political propaganda" as used in FARA is pejorative and derogatory. The district court found no basis for that claim and concluded that the asserted harm to petitioners is at best "highly speculative" (Pet. App. 23a) and "in all likelihood * * * non-existent" (*id.* at 25a):

> In order to find allegations of factually specific injury, the Court would be forced to make several assumptions concerning the reaction of the public to the listing of plaintiffs in the dissemination reports. First, the Court would have to assume that the public would react negatively to a film labelled "political propaganda" despite the neutral definition of the term provided in the FARA. *See* 22 U.S.C. § 611(j). Additionally, the Court would have to assume that this "negative reaction" would cause potential audience members to discount the films' messages or avoid the films completely. Finally, the court would have to assume that the public will lose respect for the plaintiffs because they chose to show the movies, even though it is clear that the FARA does not, on its face denigrate the "aesthetic, artistic or educational merits" of the films. The Court cannot make such assumptions for the

> plaintiffs in the absence of any facts tending to show that such fears are concrete or likely to materialize as actual injury.

Id. at 23a-24a (footnotes omitted). Emphasizing that "FARA does not define the term ['political propaganda'] in any negative fashion" (*id.* at 26a n.9) and that the statutory definition is "neutral [and] non-pejorative" (*id.* at 27a), the court found that the injuries alleged by petitioners "would be due to the public's false impression that the government had negatively classified the films rather than due to the government's attaching of a neutrally defined word under the FARA" (*id.* at 26a n.9) and that "nothing the government has said or done can reasonably be interpreted to lead to [such injuries]" (*id.* at 25a).

Finally, the district court noted its disagreement with the decision of Judge Ramirez in *Keene* v. *Smith*, 569 F. Supp. 1513 (1983), subsequent opinion, 619 F. Supp. 1111 (E.D. Cal. 1985), prob. juris. noted *sub nom. Meese* v. *Keene*, No. 85-1180 (Apr. 21, 1986). The court indicated its view that, contrary to Judge Ramirez's ruling, "[t]he speculative nature of such injuries [alleged by the plaintiff in *Keene*] should have precluded a finding of standing" (Pet. App. 29a n.10). In addition, in contrast to Judge Ramirez' analysis, the court below concluded that Congress, in using the term "political propaganda" in FARA, did not act "to impose negative connotations on the materials so as to deter audience viewing" (*id.* at 28a); rather, "Congress sought to inform the public of the nature of foreign materials on 'matters which on the domestic level would be called a policy matter' " (*id.* at 31a, quoting H.R. Rep. 1470, 89th Cong., 2d Sess. 7 (1966))—a " 'particularly sensitive area[] in which the line between

political and non-political action is difficult to define' " (Pet. App. 30a, quoting H.R. Rep. 1470, *supra*, at 4).

4. On May 16, 1984, petitioners appealed the district court's judgment to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals heard oral argument on February 12, 1985, and the case remains under submission.

ARGUMENT

1. Petitioners urge the Court to grant a writ of certiorari before judgment in order to consider this case together with *Meese* v. *Keene*, prob. juris. noted, No. 85-1180 (Apr. 21, 1986). To the extent that petitioners wish to be heard on the questions that are presented in *Keene*, their interests are adequately protected by the opportunity to appear as amici curiae in that case. In fact, petitioners did submit an amicus brief at the jurisdictional stage in *Keene*.

Petitioners do not confine themselves to the questions presented in *Keene* and instead invite the Court to address several issues that *Keene* does not raise. However, petitioners have failed to demonstrate that those issues warrant this Court's review at all, let alone that they satisfy the stringent standard for certiorari before judgment:

> A petition for a writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

Sup. Ct. R. 18. See also *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, Circuit Justice) (certiorari before judgment "is an ex-

tremely rare occurrence"). As the petition itself makes clear, the new issues that petitioners seek to interject merely involve statutory questions on which there is no conflict in the circuits.

Indeed, certiorari before judgment would be especially unwarranted in the circumstances of this case. Because the district court dismissed the complaint on grounds of standing without reaching the merits of petitioners' claims, there has been no ruling below on the issues of statutory construction raised by petitioners. Thus, the Court is being asked not to review a decision of a lower court but instead to pass upon these issues in the first instance, much like a district court acting on cross-motions for summary judgment. Moreover, to our knowledge, *no* court has adjudicated the issues advanced by petitioners, and consequently this Court would be without the benefit of the considered views of the federal courts and their thorough exploration of the legal issues. See *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); *Califano* v. *Yamasaki*, 442 U.S. 682, 701-702 (1979); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).[1]

Finally, since the case has already been briefed and argued in the court of appeals, it would be a waste of judicial resources to forestall at this juncture a decision that has been under advisement for some 15 months.

Just as an amicus curiae is not permitted to expand the questions presented by the parties (see, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981)), so too petitioners, as strangers to

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[1] In their amicus brief at the jurisdictional stage in *Keene* (at 3, 5-6, 19), petitioners emphasized the importance of allowing the court of appeals to proceed to decision in *Block*.

the *Keene* litigation, should not be allowed to introduce new issues into that case. If the court of appeals had decided *Block* after probable jurisdiction was noted in *Keene*, this Court's normal practice would be simply to hold a petition for certiorari in *Block* pending the outcome of *Keene*. Surely there is no more reason here, where the court of appeals has not yet rendered its decision, for this Court to grant review. Accordingly, the petition for a writ of certiorari before judgment should be denied. See *Merck & Co.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980).

2. Petitioners nevertheless argue that considerations of sound judicial administration militate in favor of certiorari before judgment in this case. For the reasons discussed above, however, sound judicial management hardly counsels that the Court should grant certiorari before judgment on statutory questions that do not now warrant review and that have not been decided by either of the courts below or by any other court. In any event, petitioners' substantive contentions are without merit,[2] and granting certiorari before judgment in this case would not result in the advantages that petitioners claim.

a. Petitioners first assert that the three Canadian films were not properly classified under FARA because the term "political propaganda" in the Act applies only to materials that are "subversive—*i.e.*,

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[2] Because petitioners have not addressed the merits of the questions they present and do not rely on the merits as a basis for certiorari before judgment, we shall outline our position on those issues only briefly. For the convenience of the Court, a copy of the government's brief in the court of appeals is being lodged with the Clerk.

designed to overthrow the United States government illegally or to damage the nation—or 'propaganda' in the commonly accepted usage of that term—*i.e.*, put forward with ulterior motives as part of an effort to mislead" (Pet. 11-12 (footnote omitted)). They urge the Court to address this statutory issue in order to obviate the issue presented in *Keene* of whether the phrase "political propaganda" in FARA is unconstitutionally pejorative (see Pet. 3-4, 11, 13).

Petitioners' argument is insubstantial. As we discuss in our jurisdictional statement in *Keene* (at 13-17, 21-25), the statutory term "political propaganda" has a neutral meaning that is not pejorative or derogatory. This is clear from the face of the statute, which expressly defines "political propaganda" in a neutral and valid way, and from the legislative history of the Act, which demonstrates that Congress did not intend the term to have a more limited, disparaging construction. Moreover, petitioners' interpretation is inconsistent with the settled application of the statute since the time of its enactment more than four decades ago. In short, there is no basis for the contrived definition that petitioners seek to impress on the statute.

Nor would this issue enable the Court to avoid consideration of our constitutional argument in *Keene*.[3] An integral part of our analysis in *Keene* is that the phrase "political propaganda" in FARA has a neutral rather than a pejorative meaning—precisely the issue that petitioners raise in support of their request for certiorari before judgment. Thus, granting review in this case would not eliminate the

[3] As shown by our jurisdictional statement in *Keene*, the validity of FARA is sufficiently clear that the Court need not strain to construe the statute to avoid a constitutional problem.

need for the Court to confront our submission in *Keene*. Conversely, certiorari before judgment is not necessary here to allow the Court to consider the congressional understanding of the term "political propaganda." [4]

b. Petitioners also assert that FARA applies only to materials that are "transmitted in a foreign principal's *political* interest" (Pet. 12-13 (emphasis in original)) and therefore that the Act does not extend to the three Canadian films because they were distributed "solely for artistic and commercial, not political, purposes" (Pet. 13). This proffered reading of the Act is plainly incorrect. By its terms, the statute requires only that materials satisfying the definition of "political propaganda" in 22 U.S.C. 611(j) be transmitted "for or in the interests of such foreign principal." 22 U.S.C. 614(a). Nothing in Section 614(a) differentiates among the various possible interests of the foreign principal, which at all events could not be readily determined in most instances. In fact, the language "for or in the interests of" a foreign principal, upon which petitioners' argument rests, was added in 1966 simply to clarify that the Act does not cover the dissemination of materials by foreign agents acting in their own interest rather than in the interest of the foreign

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[4] In the particular circumstance involved in *Keene*, where the statutory issue is essentially subsumed in the constitutional question presented, the Court would be free—even without granting certiorari before judgment in *Block*, and even though the statutory issue was not separately raised in the district court in *Keene*—to give the term "political propaganda" a narrow definition if, in undertaking the constitutional analysis in *Keene*, it concludes that the Act should be so construed. Cf. *United States* v. *Albertini*, No. 83-1624 (June 24, 1985), slip op. 4.

principal. See H.R. Rep. 1470, 89th Cong., 2d Sess. 13 (1966).

In addition, this statutory issue does not present a limiting construction that would obviate the question of the constitutionality of the phrase "political propaganda" in FARA. The constitutional validity of the definition of "political propaganda" in 22 U.S.C. 611(j) is entirely distinct from the issue whether, in order to be covered by the Act, such materials must be disseminated in the political interests of the foreign principal under 22 U.S.C. 614(a). While petitioners' construction, if accepted, would avoid the need to rule on the constitutional question in *Keene* itself, it would neither prevent the constitutional question from arising in FARA cases in the future nor change in any way the nature of that question. Especially since this statutory issue was not raised below in *Keene* and is not subsumed in our jurisdictional statement, it provides no basis for granting certiorari before judgment here.

c. Section 614(a) of Title 22 requires that foreign agents file dissemination reports "setting forth full information as to the places, times, and extent" of their transmittals of materials covered by the Act. In addition, 22 U.S.C. 620 provides that "[t]he Attorney General may at any time make * * * [and] prescribe * * * such rules, regulations, and forms as he may deem necessary to carry out the provisions of this subchapter." Pursuant to those provisions, Department of Justice regulations and prescribed forms, 28 C.F.R. 5.401(b) (see Pet. App. 44a-45a), specify that the required dissemination reports shall "[l]ist names and addresses of persons or organizations receiving 100 copies or more [of covered materials]" and, for films, identify the "[n]ame of

[the] station, organization or theater using [the film]," the "[d]ate or dates [the film was] broadcast or shown," and the "[e]stimated attendance." Petitioners argue (Pet. 14) that this regulation exceeds the scope of the Attorney General's statutory authority.

This issue—which was not raised in *Keene* and has never been decided by any court [5]—does not justify the grant of certiorari before judgment here. The validity of the regulation under the Act does not bear on the constitutionality of the phrase "political propaganda" in FARA. Moreover, petitioners have utterly failed to substantiate their bare assertion that the regulation "go[es] well beyond" (Pet. 14) the statutory provision that foreign agents submit reports to the Attorney General "setting forth full information as to the places, times, and extent" of their dissemination of covered materials (22 U.S.C. 614(a)). Nor have petitioners offered any ground to overcome the deference that is accorded an agency's interpretation of the statute it administers. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). In short, this issue plainly does not warrant review by certiorari before judgment and would only add another, unrelated question to those presented in *Keene*.

d. Finally, petitioners contend that certiorari before judgment is appropriate to consider the issue of their standing to sue. In petitioners' view, their claim of standing is stronger than that of Keene. Thus, petitioners argue, review in this case would obviate the need to resolve the issue of Keene's stand-

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[5] Indeed, petitioners themselves did not raise this statutory issue in the court of appeals in this case.

ing and better enable the Court to reach the merits of the constitutionality of FARA.

We, of course, agree with petitioners' recognition (Pet. 17, 19) that Keene's standing is at best open to substantial doubt. But that consideration provides no basis for certiorari before judgment.

First, as explained in our brief in the court of appeals (at 16-39), we do not believe that petitioners—any more than Keene—have standing to bring this lawsuit. Indeed, the district court so held here. Accordingly, notwithstanding petitioners' blithe assertions, their standing is far from clear.

Moreover, review in this case would not obviate the need to address the question of standing. On the contrary, it would simply require the Court to resolve the standing of one plaintiff rather than another. And if, as we contend, Keene is held to lack standing, and if a court in the future should again invalidate the "political propaganda" provision, there will be time enough for this Court to consider the constitutionality of FARA in a case that works its way through the judicial system in the normal course.[6]

In addition, the Court's resolution of the question of standing in *Keene* will illuminate if not dispose of

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[6] Petitioners' reliance (Pet. 4) on *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), is misplaced. First, in contrast to the instant situation, the "companion cases" decided in *McCulloch* "involv[ed] the same facts" (372 U.S. at 12) and presented the identical legal issue. Furthermore, granting certiorari before judgment in the related cases enabled the Court to avoid a jurisdictional question in the lead case and thus to reach the merits of the issue that warranted its review; here, on the other hand, review in *Block* would not obviate the question of standing but would simply substitute one standing issue for another.

the issue of standing in this case. If the court of appeals had already decided petitioners' case, this Court's customary approach would be to hold the ensuing petition for certiorari pending decision of *Keene*. There is no reason for any different treatment here, especially since petitioners seek the extraordinary step of circumventing the court of appeals altogether.

We also note the inconsistency in petitioners' position before this Court. On the one hand, they urge the Court to grant certiorari before judgment on the issue of standing in order to ensure that the Court reaches the merits of the constitutionality of FARA. On the other hand, as discussed above, they urge the Court to grant certiorari before judgment on certain statutory issues in order to obviate the need for the Court to consider the merits of the constitutional issue. Petitioners certainly cannot have it both ways. But beyond that, petitioners have presented no reason that would warrant certiorari before judgment in this case on any issue.

e. Petitioners are not aided by the cases they cite regarding certiorari before judgment (Pet. 3 n.1). None of those cases concerned an attempt, as here, to interject new and separate issues into a pending proceeding. Rather, in those instances in which the Court has granted review, the issues raised in the respective cases were substantially identical. Moreover, on each occasion, the decisions under review either involved the same court of appeals, so that the circuit had already passed upon the legal question presented in the petition for certiorari before judgment,[7] or pertained to a single dispute and presented

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[7] See *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946), and *Porter* v. *Lee*, 328 U.S. 246, 251 n.3 (1946); *Johnson* v. *Fleet Corp.*,

potentially inconsistent legal obligations that could not be jointly fulfilled by the parties.[8] No comparable circumstances are presented in this case, and the exceptional procedure for certiorari before judgment is inappropriate here. See *Merck & Co.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, cert. before judgment denied, 449 U.S. 1038 (1980).

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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280 U.S. 320, 322-325 (1930). See also *Taylor* v. *McElroy*, 360 U.S. 709, 709-710 (1959), and *Greene* v. *McElroy*, 360 U.S. 474 (1959).

[8] See *New Haven Inclusion Cases*, 399 U.S. 392, 414, 418 (1970); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963). See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 671-674 (1979); *Hannah* v. *Larche*, 363 U.S. 420, 422-423 & n.3, 428-430 (1960).

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